Tales from the CAAF:[1] The Continuing Burial of Article 31(b) and the Brooding Omnipresence[2] of the Voluntariness Doctrine

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Introduction

This is getting kind of spooky. The words in the statute are the same. The Constitution upon which the statute is based is the same. But the scope and applicability of Article 31(b)[3] continues to change before our very eyes. It cannot be evolution; evolution deals with gradual progressive development from a simple to a complex form.[4] I don't think it's magic; magic normally involves some sort of illusion or clever recitation of magic words.[5] Finally, it really cannot be described as erosion, as the figurative banks of Article 31(b) and the Fifth Amendment[6] have not receded an inch.

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1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review (CMR) and the United States Court of Military Appeals (CMA). The new names are the United States Army Court of Criminal Appeals (ACCA), the United States Air Force Court of Criminal Appeals (AFCCA), the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA), the United States Coast Guard Court of Criminal Appeals (CGCCA), and the United States Court of Appeals for the Armed Forces (CAAF). For the purposes of this article, the name of the court at the time of the decision is the name that will be used in referring to that decision.

2. In the course of discussing the limited propriety of judicial rulemaking, Justice Holmes stated:

> I recognize without hesitation that judges do, and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court . . . . The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.

Southern Pacific Co. v. Jensen, 244 U.S. 205, 221-22 (1916) (Holmes, J., dissenting).

3. UCMJ art. 31(b) (1988). Article 31 has remained unchanged since its enactment in 1950. Article 31(b) provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

4. WEBSTER'S NEW WORLD DICTIONARY 472 (3d College ed. 1988).

5. For example, while conjuring a series of apparitions for the benefit of Macbeth, the three witches chanted the following:

> *First Witch.* Round and round the caldron go:
> In the poisoned entrails throw.
> Toad that under cold stone
> Days and nights has thirty-one
> Swelt'red venom sleeping got, Boil thou first i' th' charmed pot.
>
> *All.* Double double toil and trouble;
> Fire burn and caldron bubble.
>
> *Second Witch.* Fillet of fenny snake,
> In the caldron boil and bake;
> Eye of newt and toe of frog,
> Wool of bat and tongue of dog,
> Adder's fork and blindworm's sting,
> Lizard's leg and howlet's wing,
> For a charm of pow'rful trouble,
> Like a hell-broth boil and bubble.

WILLIAM SHAKESPEARE, MACBETH act 4, sc. 2.

6. The self-incrimination clause of the Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

Several distinct jurisprudential concerns have influenced development of interrogation and self-incrimination law. Early common law limitations on the admissibility of confessions and admissions were based on a doctrine of voluntariness.[7] Driven by the premise that coerced confessions are unreliable, the aim of the voluntariness doctrine was to prevent consideration of such evidence by the trier of fact. Beginning in the late 19th century, however, additional concerns regarding fairness, due process and individual liberties coalesced with the doctrine of voluntariness.[8] Then, with the enactment of Article 31 and the decision in *Miranda v. Arizona*,[9] something of a litmus test became available for threshold assessments of voluntariness.

Twenty years ago, one commentator expressed concern that some practitioners incorrectly presumed that the voluntariness doctrine had been subsumed by the development of procedural safeguards of Article 31, *Miranda*, and their progeny. As he predicted,[10] however, subsequent limitation of these procedural safeguards[11] has led to a resurgence of the voluntariness doctrine as an important element in admissibility analysis.

This article will examine several cases decided by the Court of Appeals for the Armed Forces (CAAF) in 1996 that represent the latest curtailment of the procedural safeguard of voluntariness contained in Article 31(b). These cases continue the internment of Article 31 that began in earnest in *United States v. Loukas*,[12] where the CMA shifted the focus of Article 31(b) applicability analysis from the perspective of the suspect to the subjective designs of the interrogator.[13]

Meanwhile, the voluntariness doctrine has clearly survived the birth and near death of procedural safeguards. In fact, it remains well positioned to compensate for the revision of previous understandings about the applicability of Article 31(b) and *Miranda*-based protections. This article will examine several recent cases from military appellate courts that illustrate this phenomena.

The Applicability of Article 31(b) to Judicial Proceedings

One of the more startling cases of 1996 was *United States v. Bell*.[14] On 17 January 1990, Bell and two fellow Marines were questioned by the Naval Investigative Service[15] (NIS) about a robbery.[16] Bell was advised that he was suspected of aggravated assault, robbery, and conspiracy to commit assault and robbery. Bell waived his rights and provided both an exculpatory statement and an alibi for his friends.[17] A witness, however, identified the other two Marines as the perpetrators of the crime. Based on this witness' statement, the other two Marines were charged with the robberies. Bell was not identified by the witness, and he was not initially charged.[18]

On 20 February 1990, Bell appeared as a defense witness at the joint Article 32[19] hearing for the other two Marines.[20] At the beginning of his testimony, the defense counsel for one of the accused asked Bell if he had been previously advised of his Article 31(b) rights.[21] He responded that he had, and no rights warnings were repeated. Bell then testified consistently with his earlier statement to NIS, exculpating himself and providing

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7. Fredric I. Lederer, *The Law of Confessions: The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 72 (1976) [hereinafter Lederer, *Voluntariness Doctrine*] (discussing the on-going relevance of the voluntariness doctrine in spite of the more recent development of procedural safeguards in the 20th Century).

8. *Id.* at 72-76.

9. 384 U.S. 435 (1966).

10. Lederer, *Voluntariness Doctrine*, *supra* note 7, at 68.

11. *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. J. 59 (1989) [hereinafter Benner, *Requiem for* Miranda].

12. 29 M.J. 385 (C.M.A. 1985).

13. *See infra* notes 60-84 and accompanying text.

14. 44 M.J. 403 (1996).

15. NIS was renamed as the Naval Criminal Investigative Service (NCIS) in December 1992. For the purposes of this article, the name of the organization at the time of the investigation will be used in referring to that investigation.

16. *Bell*, 44 M.J. at 405.

17. *Id.*

18. *Id.*

19. UCMJ art. 32 (1988). Article 32 provides that no charge may be referred to a general court-martial until a thorough and impartial investigation of all the matters set forth in the charge or charges has been made. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 405 (1984) [hereinafter MCM], sets forth the procedures for the so-called Article 32 pre-trial investigative hearing.

20. *Bell*, 44 M.J. at 405.

alibis for the other two Marines. Following this testimony, Bell was charged with perjury at the Article 32 hearing, false swearing in his statement to NIS, and several offenses arising from his alleged participation in the robbery.[22]

At his own trial, Bell moved to suppress evidence of the statements he made at the alleged co-conspirators' Article 32 hearing, claiming that they were obtained in violation of Article 31(b).[23] The military judge denied the motion for three reasons. First, he found "that for all intents and purposes,"[24] Bell had received an Article 31(b) warning by acknowledging that he had previously been advised of those rights by NIS and that he had waived those rights during the NIS interview. Second, the military judge held that Article 32 officers are not required to give Article 31 warnings. Finally, and mysteriously, the military judge found that Article 31(b) warnings were not required at the Article 32 hearing because Bell's appearance as a defense witness was voluntary.[25] The first and third bases of the military judge's ruling were not addressed by the CAAF. Instead, the court mooted issues concerning adequacy of the unspoken warning and the effect of voluntary appearance before interrogators by broadly declaring that "[t]he Article 31 requirement for warnings does not apply at trial."[26]

As a threshold matter, the court explained that like post-referral court-martial proceedings, pretrial investigations conducted in accordance with Article 32 are judicial proceedings.[27] Based on this classification, the court concludes that Article 32 investigations are "not a disciplinary or law enforcement tool within the context of Article 31."[28] With very limited discussion, the CAAF suggests that its ruling concerning the inapplicability of Article 31(b) at judicial proceedings is merely a reaffirmation of an old rule. In fact, the court lists several sources of purported precedent for its decision.[29] Examination of the cited sources, however, reveals a rather weak foundation for a wall limiting applicability of Article 31(b) to interrogations undertaken outside the courtroom.

The court first relies upon Military Rule of Evidence 301(b)(2).[30] Rule 301(b)(2) dictates that failure to advise a witness about the privilege against self-incrimination does not make the testimony of the witness inadmissible. This aspect of Military Rule of Evidence 301, however, has more to do with *standing* to assert a violation of the statute than with the underlying requirement to warn. As with Fourth Amendment and *Miranda* violations, an accused may not suppress evidence based on government violations of someone else's Article 31 rights.[31] Accordingly, although Military Rule of Evidence 301(b)(2) states that military judges should advise apparently uninformed witnesses of their privilege against self-incrimination if they appear likely to incriminate themselves, the rule also provides that the failure to provide the advice does not make the testimony of that *witness* inadmissible.

The effect of this rule changes, however, when the participants in a case assume different roles in a subsequent court-

21. *See supra* note 3.

22. *Bell*, 44 M.J. at 405.

23. *Id.*

24. *Id.* (quoting the record of trial).

25. The circumstances that give rise to Article 31(b) warning requirements are set forth in Article 31(b). *See supra* note 3. If a service member is a suspect or an accused, it is irrelevant that he voluntarily presents himself for interrogation to a person subject to the provisions of Article 31(b). Voluntary appearance, however, may be a factor in a *Miranda* warning determination because *Miranda* warnings are triggered by custodial interrogation. Miranda v. Arizona, 384 U.S. 435, 467-73 (1966). Custody, however, is not an element of Article 31(b) analysis.

26. *Bell*, 44 M.J. at 405 (citing United States v. Howard, 17 C.M.R. 186 (1954)).

27. *Bell*, 44 M.J. at 405-06.

28. *Id.*, *citing* United States v. Collins, 6 M.J. 256, 258-59 (C.M.A. 1979) (Article 32 officer is a "judicial person" subject to American Bar Association standards for trial judges). The court did not explain how the investigating officer's judicial status affects trial and defense counsel responsibilities under Article 31(b).

29. *See infra* notes 30-47 and accompanying text.

30. MCM, *supra* note 19, MIL. R. EVID. 301(b)(2). The rule states:

> *Judicial advice.* If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such request is made out of the hearing of the witness and, except in a court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

Id.

31. United States v. McCoy, 31 M.J. 323, 328 (C.M.A. 1990). The "exclusionary rule does not apply with respect to coerced or unadvised statements from witnesses which incriminate someone else . . . . Instead, evidence of coercive or illegal investigatory tactics employed by the Government to secure such evidence or subsequent testimony based thereon may be presented to the factfinder for purposes of determining the weight to be afforded this evidence." *Id.* (citations omitted).

martial. For example, when a person who was formerly a witness is cast in the role of the accused in a subsequent proceeding, it defies logic to suggest that he does not have *standing* to challenge the admissibility of his own prior statements. At this point, the issue of standing must be decided in favor of the accused. Then, the question of admissibility should be resolved based upon rules governing the type of evidence in question. Military Rule of Evidence 301(b)(2) dictates that Bell's alleged co-conspirators would not have had standing to suppress Bell's unwarned statements at their trial. I submit, however, that this portion of the rule was inapplicable in the trial of Private First Class Bell. Bell was not a mere witness at his own trial. He was the accused. Accordingly, the court should have been guided by rules concerning admissibility of statements by the accused.

Next, the court cites the 1954 case of *United States v. Howard*[32] to support its ruling that "[t]he Article 31 requirement for warnings does not apply at trial."[33] In *Howard*, the court considered the admissibility of statements the accused had made while testifying in an earlier trial as a government witness.[34] Howard appeared as a prosecution witness during the court-martial of a stockade guard charged with negligently permitting a prisoner (Howard)[35] to escape. On cross-examination, however, Howard indicated that he had assaulted and stolen from the guard prior to his flight. As a result of this testimony, the guard was acquitted of the charge against him, and Howard was elevated from his role as a witness to the position of the accused, with additional charges concerning the admitted larceny and assault.[36]

Howard, like Bell, sought to suppress the statements he made as a witness because they were received in response to unwarned questioning. Although a board of review found that the court-martial had erred in admitting the unwarned statements, the CMA disagreed.[37] The court found that the board of review decision improperly "extended the coverage of [Article 31] beyond its terms and applied it in a manner not contemplated by Congress."[38] Unfortunately, the court's explanation for its ruling reflects discomfort in applying the plain language of the rule, rather than discovery of legislative intent to the contrary.

The *Howard* court refers to the nine pages of questions and answers about Article 31, recorded during Congressional hearings preceding enactment of the Uniform Code of Military Justice, as an indication of "the perplexities" entailed in understanding the statute's application.[39] The reference establishes nothing. Assuming we accept nine pages of discussion as evidence of significant deliberation, the fact remains that nearly six pages of that discussion concerned the little-used provisions of Article 31(c), proscribing the asking of degrading questions at courts-martial.[40] More importantly, the few references in the legislative history to Article 31(b) more reasonably reflect the committee's appreciation of the broad scope of its requirements, rather than an intent to terminate its applicability at the entrance to the courtroom.[41]

As discussed during the House of Representatives hearings,[42] the primary limiting feature of Article 31(b) is apparent on its face. That is, only suspects and accused are entitled to self-incrimination warnings before questioning. The suspect/accused determination is based upon whether, at the time of the questioning, the interrogator believed or reasonably should have believed that the person interrogated committed an offense.[43] A person's transitory role as a witness at someone else's trial does not logically affect that determination.

As discussed in *Howard*, the provision of rights warnings to witnesses at trial does present some practical problems. The court discusses, *inter alia*, the chilling effect such action might

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32. 17 C.M.R. 186 (C.M.A. 1954).

33. *Bell*, 44 M.J. at 405.

34. *Howard*, 17 C.M.R. at 188-89.

35. *Id.*

36. *Id.* At the time he testified as a witness, Howard was facing charges of absence without leave and escape from confinement. The *Howard* opinion does not indicate the basis for his confinement status at the time he fled.

37. *Id.*

38. *Id.*

39. *Id.* at 189-90, *citing Hearings Before House Armed Services Committee on H.R. 2498*, 81st Cong. 983-92 (1949) [hereinafter Hearings].

40. *See id.* UCMJ art. 31(c) (1988) provides that, "No person subject to the Code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him."

41. *See* Hearings, *supra* note 39, at 986, 988, 990-92.

42. *Id.* at 988-91.

43. United States v. Leiffer, 13 M.J. 337 (C.M.A. 1982).

have on the truthfinding process, the burden such an obligation would present to the prosecutor charged with proving the government's case, and the often-discussed dilemma of defense counsel in their dual roles as military officers and ethically bound defenders of the accused.[44] These matters, however, do not justify subversion of the statutory entitlement of suspects to be advised of their rights in accordance with Article 31. Additionally, Military Rule of Evidence 301(b)(2) largely resolves the question of practical implementation of Article 31(b) at trial. Although the truth-finding process may certainly be affected by a witness who invokes his or her constitutional privilege against self-incrimination, the rule calls for necessary warnings to be made outside the hearing of court-martial members.[45] Further, the rule calls for the military judge to provide *sua sponte* rights advice in situations of apparent applicability where neither party has made a preliminary request.[46] Accordingly, although it does support *Bell*, *Howard* itself is set upon an illusory foundation.

The *Bell* court also cites several civilian cases which provide that *Miranda* warnings are not required for grand jury witnesses.[47] This provides little help, however, because the requirement for *Miranda* warnings differs greatly from the requirement set forth in Article 31(b). *Miranda*'s criteria of custodial interrogation as a triggering mechanism for its warning requirements logically removes most situations of witness testimony at judicial proceedings from its realm.

Interestingly, the *Bell* court did not cite its own more recent ruling concerning Article 31 applicability in *United States v. Milburn*.[48] In *Milburn*, the court held that during a court-martial in which "incriminating statements are deliberately sought from a *witness suspect* unrepresented by counsel, it is required as a matter of military due process and fundamental fairness that appropriate warnings be given by the questioning defense counsel."[49] Writing for the *Milburn* majority, Judge Fletcher acknowledged and criticized the court's earlier muddled pronouncement on this issue in *Howard*: "It is not my intention at the present time to adopt an excessively narrow interpretation of this codal provision which would emaciate its protection on the basis of conjectural assumptions."[50] The *Milburn* court recognized that, just as in many other military settings, issues may arise in trial scenarios regarding whether an attorney conducting an examination is a person subject to warning requirements of Article 31(b) or whether a witness is a suspect as contemplated by the language of Article 31(b). *Milburn* clearly answers the question of threshold applicability of Article 31(b) at courts-martial in an affirmative fashion. The *Bell* rule now stands in direct conflict with that decision.

Perhaps an unarticulated premise in *Bell* is that judicial proceedings do not contain a coercive dynamic that might reasonably hinder free exercise of the privilege against self-incrimination. One might also argue that rights warnings are unnecessary during judicial proceedings because they contain other adequate procedural safeguards to ensure the reliability of in-court testimony.[51] Both of these theses are subject to dispute. First, the formal trappings of a court-martial, and the sometimes commanding presence of the military judge and counsel, arguably *do* impose the "pressure to respond" that is traditionally associated with superior military rank and position. Additionally, Article 31(b) serves as a procedural safeguard to dispel *inherent coercion* in a designated circumstance where the power of the government places free exercise of the privilege against self-incrimination at risk. Perhaps the CAAF has now determined that statements received during judicial proceedings contain *other* adequate indicia of reliability. As with *Miranda* warnings, however, a showing of reliability alone does not satisfy Article 31(b) requirements. In this regard, CAAF lacks the authority to summarily override the congressional mandate in situations where the statutory elements for triggering the warning requirement exist.

Despite the problems discussed above, the case-specific result in *Bell* is acceptable. Even if we determine that Article 31(b) warnings were required in Bell's case, the failure to provide required warnings is only a procedural violation. Statements rendered generally inadmissible due to procedural violations are still admissible in subsequent prosecutions for perjury or the making of a false statement.[52] Nevertheless, what if during the unwarned testimony, Bell had implicated himself

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44. *Howard*, 17 C.M.R. at 190-92.

45. *See supra* note 30.

46. *Id.*

47. *Bell*, 44 M.J. at 406 (citing United States v. Washington, 4431 U.S. 181, 186 (1977); United States v. Mandujano, 425 U.S. 564, 582 n.7 (1976); United States v. Gillespie, 974 F.2d 796, 803 (7th Cir. 1992)). The reference to grand jury testimony arises from the fact that Bell's incriminating statements were made during an Article 32 hearing. The court points out that the Article 32 hearing is the military equivalent of a grand jury. *Id., citing* United States v. Nickerson, 27 M.J. 30, 31-32 (C.M.A. 1988).

48. 8 M.J. 110 (1979).

49. *Id.* at 113 (emphasis added).

50. *Id.* at 112 n.2.

51. *See, e.g.*, United States v. Salazar, 44 M.J. 464, 474 (1996) (Crawford, J., dissenting) (suggesting the focus on admissibility determinations should be on the reliability of the evidence and that the court should "hesitate to use [its] supervisory power to suppress what is otherwise reliable evidence").

with regard to the charged robbery or some other offense? Under the broad language of *Bell*, that evidence would also be admissible at a later trial. When that situation arises, I think the concern expressed by the *Milburn* court about fundamental fairness, the integrity of the system, and the duty of the trial counsel and the military judge, if not military defense counsel, will necessitate clarification of the broad statements made by the court in *Bell*.

The Significance of Police Agents' Subjective Intent During Questioning, and the Continuing Need for a Public Safety Exception to Article 31(b)

United States v. Moses[53] provides another example of the CAAF's piecemeal reduction of the applicability of Article 31(b). In *Moses*, the court decided that questions put to a servicemember by military law enforcement agents during an armed standoff do not trigger Article 31(b) requirements because they "were not undertaken pursuant to a law enforcement investigation or disciplinary inquiry."[54]

Moses is a domestic violence case. In mid-1992, Marine Corps Gunnery Sergeant Moses broke into the on-base quarters of his estranged wife and waited for her to come home from playing Bingo. It was Moses' mother-in-law, however, who first returned to the quarters. After an argument, Moses shot her in the hand and stomach.[55] When the police arrived, the victim managed to escape (and survive), and Moses was left in the house in an armed stand-off. There he sat for twenty-four hours, until tear and pepper gas induced his surrender.[56]

This is an Article 31(b) case because, during the standoff, Moses and agents of the Naval Investigative Service (NIS)[57] engaged in telephone discussions in which the agents tried to induce Moses to surrender peacefully.[58] During these conversations, Moses made a number of statements that were later the subject of a suppression motion at his trial. Moses claimed the statements should be suppressed because the agents failed to provide Article 31(b) warnings prior to the questioning. The military judge denied the motion, holding that "the questioning that led to those statements was conducted for 'public safety' reasons and was designed to induce appellant 'to surrender without risking injury to himself or others.'"[59] On appeal, CAAF affirmed the conviction, but not on the basis of a public safety exception.[60] Instead, the court found that Article 31(b) was not applicable to the facts of the case.

One of the court's earliest discussions of Article 31(b) was in the 1952 case of *United States v. Franklin*[61] as follows:

> It would appear, therefore, that where an interrogation is conducted by military personnel, the failure to give [Article 31 warnings] renders the statement inadmissible *per se*. The fact that a preliminary warning is required in military proceedings and not in civilian is not as anomalous as it might

52. MCM, *supra* note 19, MIL. R. EVID. 304(b)(1) provides:

> Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f) . . . this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

This fact was noted in *Bell* following the court's ruling that Article 31(b) was inapplicable in the first instance. *Bell*, 44 M.J. at 406.

53. 45 M.J. 135 (1996).

54. *Id.* at 136.

55. *Id.* at 133.

56. *Id.*

57. *See supra* note 15. Two NIS Special Agents spoke with Moses during the course of the siege. At the behest of the NIS, a friend of Moses also talked with him over the telephone. The friend asked Moses whether he had been drinking or was tired, what weapons he had with him, and whether he was holding any hostages. *Moses*, 45 M.J. at 133. The *Moses* court drew no distinction between the questioning by the NIS agents and of the friend. The friend was a service member of the same military rank as the accused. Although he was not a certified law enforcement agent, he would presumably have been viewed as an agent of the police authorities had the analysis proceeded beyond the question of threshold Article 31 applicability.

58. *Moses*, 45 M.J. at 133.

59. *Id.* at 134.

60. The Supreme Court has recognized a public safety exception to *Miranda* warning requirements in cases where overriding safety considerations justify police failure to provide Miranda warning requirements prior to questioning. New York v. Quarles, 467 U.S. 649 (1984). The CMA came perilously close to recognizing a similar exception to Article 31(b) warning requirements in *United States v. Shepard*, 38 M.J. 408 (C.M.A. 1993). Although *Shepard* was decided on other grounds, the court stated that warnings "might not" be required in certain circumstances due to "some possible exception to article 31, *e.g.* the 'public safety' exception." *Id.* at 411, *citing* United States v. Jones, 26 M.J. 353, 357 (C.M.A. 1988).

61. 8 C.M.R. 513 (C.M.A. 1952).

> appear at first blush. It is recognized that, where the proceedings are military, the accused, who has been subjected to military discipline with all its concepts of obedience to superior authority, will be more inclined to speak out when interrogated than a civilian without such training and background. It is this influence of implied command or *presumptive coercion* which Congress has attempted to eliminate in its enactment of Article 31(b).[62]

Accordingly, the court's original interpretation of Article 31(b) focused on the effect of military society on a suspect's or an accused's free exercise of the privilege against self-incrimination without regard to case-specific actions of the interrogator. The court determined that the coercive dynamic that Congress sought to address was *inherent* in the questioning of subordinates by military superiors.[63]

Two years later, however, the CMA decided that the true meaning of Article 31(b) could not be determined by a plain reading of the statute. In *United States v. Gibson*,[64] the Court of Military Appeals observed:

> Taken literally, this article is applicable to interrogation by all persons included within the term "persons subject to the code" as defined by Article 2 of the Code . . . . However, this phrase was used in a limited sense. In our opinion, in addition to the limitation referred to in the legislative history of the requirement, there is a definitely restrictive element of officiality in the choice of the language "interrogate, or request any statement," wholly absent from the relatively loose phrase "person subject to this code," for military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of a crime . . . . This is not the sole limitation upon the Article's applicability, however. Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation.[65]

Thus, the court set out on a course of defining and redefining the scope of Article 31(b) as a matter of judicial discretion. While its decisions in this regard are purportedly guided by the drafters' intent, the scant legislative history of Article 31 provides little support for the increasingly restrictive reading of its provisions.[66]

In *United States v. Duga*,[67] the CMA reaffirmed the principles of *Gibson*, finding that Article 31(b) applies "only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry."[68] This type of pressure was identified as the factor that might impair service members' free exercise of the constitutional guarantee against self-incrimination. The *Duga* court found that only situations where interrogators are acting in an official capacity give rise to the subtle coercive pressure contemplated by the drafters of the Code.[69]

In *United States v. Loukas*,[70] the court again narrowed the field. The *Loukas* court focused on the statutory language, "No person subject to this chapter *may interrogate, or request any statement from an accused or person suspected of an offense*."[71] as an indication that the drafters did not intend Article 31(b) requirements to apply to conversations conducted for other than

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62. *Id.* at 517 (emphasis added).

63. Concern about inherent coercion based upon the peculiar nature of the military environment is remarkably similar to the view of inherent coercion articulated by the United States Supreme Court fifteen years later in *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* Court provided an extended analysis of police interrogation techniques and concluded that the very atmosphere of custodial interrogation creates and inherent barrier to free exercise of the privilege against self-incrimination. *Id.* at 445-58.

64. 14 C.M.R. 164 (C.M.A. 1954).

65. *Id.* at 170 (citations omitted).

66. *See supra* notes 39-43 and accompanying text. For an in-depth examination of the development of the Article 31(b) officiality doctrine, see Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1, 27-71 (1995) [hereinafter McGillin, *Officiality Doctrine*].

67. 10 M.J. 206 (C.M.A. 1981).

68. *Id.* at 210.

69. *Id.*

70. 29 M.J. 385 (C.M.A. 1990).

71. *Id.* at 387. The "law enforcement or disciplinary authority" aspect of the Article 31 warning trigger was previously discussed in *United States v. Fisher*, 44 C.M.R. 227, 279 (C.M.A. 1972). Interestingly, this language was omitted from the test set forth in *Duga*.

law enforcement or disciplinary purposes. The unstated implication of this rationale is that a service member's free exercise of the privilege against self-incrimination is affected differently--that is more--by questions from a person acting in a law enforcement role or disciplinary capacity than by questions from the same person acting in an operational or private role.

Over the years, *Loukas*-style analyses have subsequently been applied to interrogations conducted by officials serving as medical personnel,[72] disbursing personnel[73] and social workers.[74] If we first apply a *Duga* official capacity analysis, these cases provide examples of apparent threshold Article 31(b) applicability. In each case, however, the interrogator's non-law-enforcement or disciplinary *function* caused the court to conclude that the circumstances surrounding the interrogations did not give rise to the coercive pressure that triggers Article 31(b) warning requirements.

Returning to *Moses*, there is no question but that the accused was suspected of violating a variety of UCMJ provisions at the time of the standoff.[75] Application of a *Duga/Loukas* analysis should lead us to an examination of the function or role of the government agents for the purposes of Article 31(b) and the heretofore separate inquiry whether the negotiation process amounted to interrogation or a request for a statement.[76] In *Moses*, however, the CAAF employs an unfortunate hybrid analysis of these two questions. The result is a reduction of the protective scope of Article 31(b).

The court begins its analysis by comparing police efforts in *Moses* to those of the famous crew chief in *Loukas*,[77] where the court distinguished operational functions from the law enforcement/disciplinary function, and to the physician in *United States v. Fisher*,[78] where questions asked in furtherance of developing a medical diagnosis were found to be outside the scope of Article 31(b) questioning.[79] From an objective standpoint, however, it is difficult to apply the rationale of these earlier cases to a police siege scenario, where the police are clearly performing a law enforcement function. In reality, the government actors in *Moses* are very unlike those in *Loukas* and *Fisher.* The *Loukas* and *Fisher* interrogators were serving in an official capacity that coincidentally uncovered evidence of misconduct. The police in *Moses* were engaged in a law enforcement role, *period*.

Accordingly, the facts of the case preclude resolution of *Moses* based on a straight-forward *Loukas* analysis. The court's ultimate holding in *Moses* was that the *negotiation process* was "not undertaken pursuant to a law enforcement or disciplinary inquiry."[80] Putting the issue of the status of the interrogator aside, this may be a ruling that the negotiation process did not amount to interrogation or a request for a statement for the purposes of Article 31(b). For along with citations to cases that discuss who is a "person subject to this chapter" for the purposes of Article 31(b) applicability, the court also relies on cases that examine the boundaries of the interrogation process.[81]

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72. United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (Army physician not required to provide warnings despite subjective belief of child abuse by the subject); United States v. Fisher, 44 C.M.R. 277 (C.M.A. 1972) (Army physician not required to provide warnings in emergency room where accused was in state of respiratory depression). The rule placing questions in furtherance of medical diagnosis or treatment was arguably extended in *United States v. Dudley*, 42 M.J. 528 (N.M.Ct.Crim.App. 1995) (questions by medical personnel asked for purpose of developing medical diagnosis or treatment are beyond the scope of Article 31(b), even when subject is delivered to the medical personnel by law enforcement agents).

73. United States v. Guron, 37 M.J. 942 (A.F.C.M.R. 1993) (interviews by accounting and finance personnel premised upon discovery of irregularities in pay records, but not primarily for the purposes of disciplinary action or criminal prosecution, does not give rise to Article 31(b) requirements).

74. United States v. Raymond, 38 M.J. 136 (C.M.A. 1993) (social worker employed by Department of the Army (DA) and subject to DA child sexual abuse reporting requirements not subject to Article 31(b) requirements).

75. "The test to determine if a person is a suspect is whether, considering all facts and circumstances at the time of the interview, the government interrogator, believed or reasonably should have believed that the one interrogated committed an offense." United States v. Morris, 13 M.J. 297, 298 (C.M.A. 1982).

76. The CAAF construction of the term "interrogate" for the purpose of Article 31(b) corresponds with the Supreme Court's interpretation of "interrogation" in applying *Miranda* warning requirements. United States v. Byers, 26 M.J. 132, 134 (C.M.A. 1988). In *Rhode Island v. Innis*, 446 U.S. 291 (1979), the Supreme Court held that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* at 300-01. The Court described the functional equivalent of questioning as "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). Accordingly, any inquiry concerning the "interrogation" portion of the Article 31(b) trigger should focus on the actions of the putative interrogator and not on that person's role or motivation.

77. 29 M.J. 385 (C.M.A. 1990). Loukas was an Air Force crewman engaged in drug suppression operations in South America. During a flight, Loukas began acting irrationally in the cargo section of his aircraft. He appeared to be experiencing a hallucination and described seeing intruders on the flight deck. The plane's crew chief ultimately approached Loukas and asked him if he had taken any drugs. No warnings were provided to Loukas prior to the questioning. Loukas replied that he had taken some cocaine the night before. *Id.* at 386.

78. 44 C.M.R. 277 (C.M.A. 1972). Fisher was brought to the emergency room of an Army hospital in a state of stupor with respiratory depression. Unwarned questions by the treating physician yielded evidence used against Fisher at his court-martial. *Id.* at 278.

79. *Id.* at 279.

80. *Moses*, 45 M.J. at 136.

Finding that negotiations during standoffs do not amount to interrogation does little harm to the established protective scope of Article 31(b). Factually similar scenarios will be relatively rare and would probably be encompassed in a public safety exception,[82] even if the statute's requirements were applicable in the first instance.

The court's prominent reliance on *Loukas* and *Fisher*, however, reveals a developing emphasis on the subjective design of interrogators in determining whether the interrogator was a person subject to Article 31(b) requirements.[83] This sort of progression will ultimately frustrate the function of Article 31(b).

Predicating threshold applicability of Article 31(b) warnings requirements upon the subjective intent of interrogators performing in an apparent law enforcement or disciplinary function ignores the fundamental purpose of the statute. Like *Miranda* warnings, Article 31(b) warnings are designed to advise or remind service members about the constitutional privilege against self-incrimination under circumstances where the superior rank or position of government agents give rise to inherent compulsion to respond to questioning.[84] Subjectively benign or collateral concerns of law enforcement agents do not reduce the inherently coercive aspect of their superiority in rank or position during the interrogation process. The law enforcement agent remains a law enforcement agent and the superior officer remains a superior officer in the objective view of a subject, regardless of the interrogator's subjective designs.[85] It is this objective view of the interrogator's position that gives rise to the inherent coercion that impedes free exercise of the privilege against self-incrimination.

He's Not a Real Policeman, He Just Plays One on the "QT"

United States v. Price[86] is another case addressing the question: Who is a "person subject to the chapter" for the purposes of Article 31(b)? In resolving the question, the CAAF continues to blur established lines of analysis governing the applicability of Article 31(b) warning requirements.

Staff Sergeant (SSgt) Price's road to jurisprudential history began when one of his co-workers (SSgt Moore) reported that he had heard Price was using drugs. The co-worker passed the information to the pair's common supervisor and made a separate report to the Air Force Office of Special Investigations (OSI).[87] In response to this report, an OSI special agent took Moore to lunch to discuss Moore's concerns about Price's drug use. The OSI agent told Moore that OSI did not have an active investigation on Price, but that Moore could continue to provide information on a voluntary basis. Curiously, in an apparent effort to affirmatively deformalize the relationship, the

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81. In its examination of the interrogation issue, the court discusses *United States v. Vail*, 28 C.M.R. 358 (C.M.A. 1960), and a series of cases from civilian jurisdictions considering application of *Miranda* warning requirements. In *Vail*, the court ruled that questions about the location of stolen weapons asked at gun point, in the course of apprehension, did not give rise to Article 31(b) protections. *Id.* at 359-60. Importantly, the *Vail* court focused on the timing and practical necessity of the questioning during ongoing police operations, rather than on some metaphysically changing role of the police agents.

Similarly, the cited *Miranda* cases all deal with the issue of whether certain police actions amounted to interrogation for the purposes of triggering *Miranda* warning requirements. *Moses*, 45 M.J. at 134, *citing* United States v. Mesa, 638 F.2d 582, 589-90 (3d Cir. 1980) (Adams, J., concurring) (conversations between agent and barricaded suspect did not constitute "interrogation"); State v. Reimann, 870 P.2d 1346, 1350 (Kan. App.) (questioning not "functional equivalent" of interrogation when police in siege situation were trying to persuade defendant not to shoot himself); State v. Sterns, 506 N.W.2d 165, 167-68 (Wis. Ct. App. 1993) (negotiations not "interrogation" of suspect, because police purpose was "to secure his nonviolent surrender, not to induce him . . . to incriminate himself").

82. *See supra* note 60.

83. United States v. Pownall, 42 M.J. 682 (Army Ct. Crim. App. 1995), *review denied*, 43 M.J. 229 (C.M.A. 1995), is illustrative of this trend. Pownall was questioned by his unit first sergeant after his earlier explanation for a period of unauthorized absence did not check out. Pownall's responses to the unwarned questions gave rise to charges that resulted in his court-martial. The *Pownall* court found the first sergeant was not conducting a law enforcement or disciplinary inquiry because his questions were "motivated by a desire to solve the soldier's problem, not to charge him with making a false official statement." *Id.* at 687.

84. The "custodial interrogation" trigger for *Miranda* warnings is reflective of the coercive dynamic the Supreme Court sought to dispel in order to ensure free exercise of the privilege against self-incrimination. *Miranda*, 384 U.S. 467-79. Likewise, the trigger for Article 31(b) is designed to require warnings when inherent coercion to respond exists in the military setting. As formerly stated by the Court of Military Appeals, Article 31(b) applies "to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry," United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981) (citing United States v. Gibbon, 14 C.M.R. 164 (C.M.A. 1954)).

85. In *Stansbury v. California*, 114 S. Ct. 1526 (1994), the Supreme Court reaffirmed the validity of an objective analysis of circumstances giving rise to inherently coercive interrogations. "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the persons being questioned . . . . [O]ne cannot expect the person under interrogation to probe the officer's innermost thoughts." *Id.* at 1529-30 (citations omitted).

In his study of interrogation law in the military jurisdiction, Major McGillin compared the confusing nature of Article 31(b) analysis with the relatively simple objective test developed by the Supreme Court for *Miranda* issues. Major McGillin suggests that if Article 31(b) is to provide the protections envisioned by its drafters, a "Mirandaesque" approach must be adopted to govern its application. *See generally* McGillin, *Officiality Doctrine*, *supra* note 66.

86. 44 M.J. 430 (1996).

87. *Id.* at 431.

agent and Moore both signed a "Declaration of Agreement that SSgt Moore was not an OSI agent, and that SSgt Moore was advised 'that if he committed a criminal act, the OSI would investigate' him, and that he must act 'as the OSI told him to do.'"[88] Then, the agent asked Moore to get some information about Price by observation and discussion with another one of Price's co-workers.

The relationship between Moore and the OSI continued when the OSI agent took Moore to lunch on a number of other occasions. During these subsequent meetings, Moore received some sort of drug training[89] and expressed a desire to become an OSI agent.[90]

Subsequent to this activity, a urine sample Price submitted during a random screening tested positive for methamphetamine. In response to the positive drug test, the OSI sought to interrogate Price. After initially waiving his rights under Article 31, however, Price terminated the interview by requesting assistance of counsel.[91] Later still, Moore had three conversations with Price wherein Price made admissions that were used against him at trial. Those statements were the subject of a defense motion to suppress based on Moore's failure to advise Price of his rights under Article 31(b).[92]

The military judge denied Price's motion, finding that a reasonable man in Price's position would not have perceived that Moore was acting in an official law enforcement or disciplinary capacity.[93] The CAAF agreed with this analysis, and it is certainly correct.[94] The military judge *also* found, however, that, although Moore was a person subject to the UCMJ who suspected Price of a crime, he was not acting in an official law enforcement or disciplinary capacity when he initiated contact with Price and received the incriminating statements. The CAAF affirmed the case on this basis as well.[95] Herein lies the damage to previous standards of Article 31(b) applicability.

In *United States v. Gibson*[96] and *United States v. Duga*,[97] the Court of Military Appeals set forth a two-part analysis for determining whether an individual questioning a suspect or an accused was a "person subject to this chapter" for the purposes of Article 31(b): "Accordingly, in each case it is necessary to determine whether (1) a questioner was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation."[98] Importantly, the court indicates that this is a *two-part test*, not a totality of the circumstances analysis based on two factors.[99]

The distinct functions of each of the two prongs of analysis are also discussed in *Duga*. The first prong examines the *status of the interrogator* at the time of the interview.[100] This is a limiting feature on Article 31(b) applicability, because the court determined that congressional concern about subtle pressure for suspects or accused to respond to questioning was limited to circumstances where the interrogator is acting in an official capacity. If an interrogator is acting on behalf of the armed services, he presumptively carries the weight and authority of rank, or official power, which *may* override a person's free exercise of the privilege against self-incrimination. On the other hand, if service members are asking questions based upon personal motivation,[101] the court views them as questioners who are not reasonably the focus of congressional concern.

The second prong of the *Duga* analysis shifts the focus of analysis from the actual status of the interrogator to the *percep-*

88. *Id.*

89. Although the reported opinion does not explain the nature of this training, we may reasonably assume it had something to do with investigations of *wrongful* drug use, and/or law enforcement actions in response to drug activity. After all, Moore and Price worked in the pharmacy section of an Air Force Medical Group. *Id.*

90. *Id.*

91. *Id.* The court briefly addressed issues raised by the anomalous request for counsel in response to Article 31(b) warnings (Article 31 does not contain a counsel provision). *Id.* at 433. This matter is beyond the scope of this article.

92. *Id.* at 431-32.

93. *Id.* at 432.

94. *See infra* note 102 and accompanying text.

95. *Price*, 44 M.J. at 432.

96. 14 C.M.R. 64 (C.M.A. 1954).

97. 10 M.J. 206 (C.M.A. 1981).

98. *Id.* at 210, *citing Gibson*, 14 C.M.R. at 170.

99. United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981). The court held that "[u]nless both prerequisites are met Article 31(b) does not apply." *Id.* (footnote omitted).

100. This prong of the analysis was later modified in *Loukas*. *See supra* notes 70-73 and accompanying text.

tion of the interrogator by the suspect or accused. As stated in *Duga*, even if the officiality prerequisite is met in a particular case, if the suspect or accused does not perceive that the interrogator is acting in an official capacity, there is no risk of coercive pressure emanating from the interrogator's actual status.[102] The second prong, therefore, should only come into question when the status of the interrogator is determined to be within the realm of Article 31(b) applicability. Once the interrogator's status is determined to be official in nature, however, the second prong may operate to remove the official questioning from the scope of Article 31(b) applicability.

The outcome in *Price* is in accord with existing Article 31(b) standards. Regardless of Moore's status at the time he spoke to Price and received the incriminating statements, there is no indication that Price perceived Moore as being anything but a co-worker at his place of duty.[103] The problem with *Price* is that the court uses the obvious answer to the second part of the *Duga* test to buttress the military judge's arguably erroneous finding that Moore was not acting in an official capacity when he received the incriminating statements.

SSgt Moore was a service member who reported a suspected violation of the UCMJ within his unit, discussed the development of an investigation with the Air Force OSI, and received some training (and several lunches) from OSI. He then proceeded to make contact with the accused for the purpose of gathering information with the intention of reporting back to his point of contact at OSI. It defies reality to characterize the actions of SSgt Moore as anything other than official action pursuant to a law enforcement or disciplinary purpose.[104]

The second prong of the *Duga* test is tailor made for application in undercover investigations. It is obviously unreasonable to require exposure of covert law enforcement agents through the reading of rights warnings. As explained in *Duga*, it is also unnecessary to fulfill the statutory purpose of Article 31(b). An analysis of the perception of the suspect or the accused, however, should not become a factor in determining the *actual status* of an interrogator in the first instance. As in a two-step dance, each part of the *Duga* analysis plays an important part. This is no time for the court to start shuffling its feet.

Interrogations After Invocations

The break-in-custody rule has been clarified! In *United States v. Vaughters*,[105] the CAAF tied up a long-standing loose end concerning interrogations after invocations of a suspect's Fifth Amendment right to counsel. In *Edwards v. Arizona*,[106] the United States Supreme Court reinforced the counsel right created in *Miranda v. Arizona*[107] with a veritable bright line rule governing initiation of interrogations after *Miranda* counsel invocations. Once an in-custody suspect asserts the right to counsel under the Fifth Amendment, "the subject is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[108]

In 1990, the CMA addressed how the *Edwards* rule was affected by a break-in-custody. In *United States v. Schake*,[109] the court found that the *Edwards* barrier arising from the accused's request for counsel at an earlier interrogation period was dissolved during a six day break in custody before a second custodial interrogation initiated by the police.[110] The break-in-custody addendum to the *Edwards* rule was subsequently called into question in some quarters following the United States Supreme Court's decision in *Minnick v. Mississippi*.[111] Without considering issues concerning prospective breaks in custody, *Minnick* held that in order for the counsel availability aspect of *Edwards* to be satisfied, the counsel must be present during any subsequent re-initiation of interrogation by the government.[112]

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101. *See, e.g.*, United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (questions by accused's immediate supervisor who was also acting as escort of accused when accused left post in pretrial status were not within scope of Article 31(b), because supervisor was motivated out of curiosity).

102. *Id.* at 211; *see also* United States v. Harvey, 37 M.J. 140 (C.M.A. 1993) (conversations with accused tape recorded by cooperating co-conspirator acting as agent of Air Force OSI); United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd on other grounds*, 34 M.J. 112 (C.M.A. 1992) (accused not aware that her former lover was acting as agent for OSI in telephoning accused and eliciting incriminating statements).

103. In fact, Price was Moore's technical supervisor. *Price*, 44 M.J. at 431.

104. The military judge went so far as to characterize Moore's targeted conversations with Price as 'casual' exchanges between co-workers." *Id.*

105. 44 M.J. 377 (1996).

106. 451 U.S. 477 (1981).

107. 384 U.S. 436 (1966).

108. *Edwards*, 451 U.S. at 484-85.

109. 30 M.J. 314 (C.M.A. 1990).

110. *Id.* at 319.

111. 498 U.S. 146 (1990).

Strict application of the *Minnick* rule, however, would have been problematic. *Edwards* protection is not limited to a prohibition against improper re-interrogation about the matter under investigation at the time of the suspect's request for counsel. So long as the barrier is in place, the suspect may not be interrogated about any offense.[113] Additionally, the *Edwards* prohibition against government initiated re-interrogation is not limited in applicability to the law enforcement agent who received the request for counsel. Instead, knowledge of the counsel request is imputed to all government agents. Accordingly, the barrier applies to all law enforcement agents regardless of the fact that they may not have actual knowledge of the original request for counsel.[114] Taking these factors together, a strict reading of *Minnick* would dictate that, following an invocation of a *Miranda* right to counsel, a suspect could never be approached by the police for any type of questioning outside the presence of counsel.

Fortunately, the Supreme Court moved relatively quickly to limit the potentially dramatic effect of *Minnick* in *McNeil v. Wisconsin*.[115] There, in dictum, the court indicated that *Minnick's* "availability means presence" rule only applies to cases involving continuous custody between the invocation of the right to counsel and the subsequent interrogation attempt by the government.[116]

Unfortunately, however, because the clarification in *McNeil* was only *dicta*, doubt lingered in some quarters whether the break-in-custody rule was still good law. The most notable source of confusion was the case of *United States v. Grooters*.[117] Specialist Grooters' conviction for attempted murder was affirmed by the Army Court of Military Review in 1992 despite the court's ruling that the military judge had erred by admitting a statement made by Grooters during an interrogation initiated by the government after Grooters' invocation of the *Miranda* right to counsel.[118] Although the record established a twenty-two day break between Grooters' request for counsel and the re-initiation of interrogation by the government, the Army court addressed neither the break-in-custody nor the effect of *Schake* and *McNeil* on the prohibitive rules set forth in *Edwards* and *Minnick*.

The break-in-custody issue was also left unaddressed by the majority of the CMA.[119] A concurring opinion by Judge Crawford questioned the majority decision to forgo correction of what she viewed as a "clearly erroneous ruling by the Court of Military Review . . . ."[120]

Falling, perhaps, in the category of "better late than never," the CAAF's 1996 decision in *Vaughters* puts the matter to rest.[121] In *Vaughters*, the court directly addressed the appellant's claim that the break-in-custody rule established in *Schake* has been superseded by the Supreme Court decision in *Minnick*.[122] Reaffirming its previous ruling in *Schake*, the court reviewed the Supreme Court cases in this area and concluded that "*Edwards* and its progeny did not intend to preclude further interrogation by police where a suspect has been provided what *Schake* describes as a 'real opportunity to seek legal advice.'"[123]

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112. *Id.* at 151-56. The Court ruled that the protection of the *Edwards* rule does not terminate once counsel has consulted with the suspect. "A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from coercive pressure that accompanies custody and that may increase as custody is prolonged." *Id.* at 153.

113. Arizona v. Robeson, 486 U.S. 675 (1988).

114. *Id.* at 687-88.

115. 501 U.S. 171 (1991).

116. *Id.* at 177.

117. 35 M.J. 659 (A.C.M.R. 1992), *rev'd*, 39 M.J. 269 (C.M.A. 1994).

118. *Grooters*, 35 M.J. at 662-63. The court found the statement was cumulative with other evidence presented at trial and was satisfied that its admission was harmless beyond a reasonable doubt.

119. The court ruled that "[s]ince the correctness of the ruling by [the Army court] as to the admissibility of the statements has not been challenged either by petition of the appellant or certification by the Judge Advocate General, we will treat it as the law of this case." *Id.* at 269-70, *citing* United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986) (unchallenged ruling by Court of Military Review constitutes the law of the case and binds the parties).

120. *Id.* at 273-74 (Crawford, J., concurring).

121. The Army court previously sought to dispel confusion left in the wake of *Grooters.* In *United States v. Faisca*, 43 M.J. 876 (Army Ct. Crim. App. 1996), the court held that in the absence of continuous custody, it will look at a totality of circumstances to determine whether an accused's ultimate waiver of his right to counsel was voluntary and knowing. With regard to *Grooters*, the court stated: "To the extent that the holdings in *Grooters* and *Schake* are inconsistent, we will not follow *Grooters*." *Id*. at 878.

122. Vaughters requested counsel during an initial interview with Air Force Security Police on 10 February 1993. He was released from custody that same day. Air Force OSI agents contacted Vaughters for a second interview on 1 March 1993. *Vaughters*, 44 M.J. at 377-78.

123. *Id.* at 370 (citations omitted).

Accordingly, rules regarding the limits of the *Edwards* barrier are now consistent within military and federal jurisdictions. Where counsel has been requested in response to a *Miranda* warning, following a break in custody, the *Edwards* barrier will be dissolved once the accused has either shown a desire to reinitiate conversation with the police about the investigation[124] or had a real opportunity to seek legal advice.[125]

Totality of Circumstances Review Remains the Key for Voluntariness Beyond Procedural Safeguards

Even if an interrogation is preceded by proper rights warnings and a proper waiver, and even when police agents have provided temporary respites from the interrogation process and reasonable opportunities to seek counsel when necessary in accordance with *Michigan v. Mosely*[126] and *Edwards v. Arizona,*[127] a statement by the accused is still subject to suppression at trial if it was not voluntarily made.[128]

The voluntariness doctrine predates use of procedural safeguards against involuntary confessions and admissions by approximately 224 years.[129] The doctrine's operation under several different names during its long tenure belies the fact that it has been a constant element of American confessions law.[130] Despite reliance of many practitioners on *Miranda* and Article 31 as the *alpha* and *omega* of admissibility, the voluntariness doctrine remains a vital element self-incrimination analysis.

The United States Supreme Court has noted that there is "no talismanic definition of 'voluntariness.'"[131] That being said, the Court frames its voluntariness analysis as follows: "Is the confession the product of an essentially free and unconstrained choice by its maker?"[132] This seemingly simple question, how-

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124. *See, e.g.*, Oregon v. Bradshaw, 462 U.S. 1039 (1983).

125. *Vaughters*, 44 M.J. at 379. Whether or not the accused takes advantage of the opportunity to consult with counsel is essentially besides the point in an *Edwards* analysis. The test is whether or not he or she had an opportunity to exercise the entitlement to do so.

126. 423 U.S. 96 (1975) (*Miranda* does not create a *per se* prohibition against further interrogations once accused indicates a desire to remain silent, but police must scrupulously honor suspect's invocation of the right to silence).

127. 451 U.S. 477 (1981); *see supra* notes 106-07 and accompanying text.

128. Arizona v. Fulminante, 499 U.S. 279 (1991).

129. In his discussion of the voluntariness doctrine, Professor Lederer noted:

> Lord Chief Baron Geoffrey Gilbert, in his *Law of Evidence*, written before 1726 though not published until thirty years later, stated that though the best evidence of guilt was a confession, 'this confession must be voluntary and without Compulsion; for our Law . . . will not force any man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation; and therefore Pain and Force may compel Men to confess what is not the truth of Facts, and consequently such extorted Confessions are not to be depended on.

Lederer, *Voluntariness Doctrine*, *supra* note 7 at 72 (citing L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 327 (1968)).

130. *See generally* Lederer, *Voluntariness Doctrine*, *supra* note 7. Voluntariness challenges may be based upon common law principles, due process concerns, or violations of either Article 31(d), or Military Rule of Evidence 304. Whatever the basis for the challenge, the analysis is largely the same. *See* United States v. Bubonics, 40 M.J. 734 (N.M.C.M.R. 1994).

Common law voluntariness doctrine took on constitutional dimensions in *Brown v. Mississippi*, 297 U.S. 278 (1936) (criminal conviction based on confession obtained by brutality and violence is invalid under the Due Process Clause of the Fourteenth Amendment).

UCMJ art. 31(d) (1988) provides that "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."

MIL. R. EVID. 304(c)(3) provides that "a statement is 'involuntary' if it is obtained in violation of the self-incrimination privilege *or* due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, *or* through the use of coercion, unlawful influence, or unlawful inducement." (emphasis added).

Some measure of government involvement is needed to support a voluntariness challenge based upon due process, or unlawful influence or inducement under Article 31. Colorado v. Connelly, 479 U.S. 157, 170 (1980) ("[t]he sole concern of the fifth amendment, on which *Miranda* was based, is governmental coercion."). Since the Constitution establishes fundamental principles concerning the relationship between the government and the citizenry, governmental action may reasonably be considered a vital element in a constitutional analysis. It does not necessarily follow, however, that such a requirement must exist in the scope of a common law voluntariness analysis. *Connelly* discusses only constitutional voluntariness. Matters beyond constitutional concerns were deemed within the province of state rules of evidence. *Id.* at 159. In drawing this distinction, the Court explained that although constitutional voluntariness is concerned with the presence of police coercion, it "has nothing to do with reliability of jury verdicts." *Id* at 168. For a more complete discussion of *Connelly*, and its effect on the voluntariness doctrine, see Benner, *Requiem for* Miranda, *supra* note 11.

Accordingly, a private party may presumably still be shown to have coerced an involuntary statement. *See* MCM, *supra* note 19, MIL. R. EVID. 304(c)(2) analysis, app. 22, at A22-10; *see, e.g.*, United States v. Trojanowski, 17 C.M.R. 305 (1954) (accused's confession inadmissible where larceny victim slapped accused following initial denials of guilt).

ever, becomes complex upon application. As with many issues of constitutional inquiry, voluntariness analysis involves balancing individual liberties against legitimate interests of the state.[133] To achieve the balancing of interests in a particular case, the Court has directed assessment of the totality of the circumstances.[134]

In *United States v. Bubonics*,[135] the CAAF reaffirmed that determinations concerning the voluntariness of a confession are based upon an assessment of the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation.[136] Applying this standard, CAAF ruled that a government interrogator's threat to turn Bubonics over to civilian authorities unless he confessed, combined with use of "Mutt and Jeff" interrogation ploys and the relatively inexperienced nature of the accused, rendered Bubonics' resulting incriminating statements inadmissible.[137] The import of *Bubonics* lies, not in a change wrought upon the voluntariness doctrine, but rather in its resistance to notions of *per se* categories of coercive government action.

The issue of a *per se* category of coercive government action came to the CAAF via the Navy-Marine Corps Court of Military Review (NMCMR). Bubonics was apprehended at 0130 on 17 October 1991 by base security personnel at Naval Air Station Oceana, Virginia, in connection with an alleged theft from a fellow sailor.[138] He was handcuffed and transported to the base security office where he was placed in a small windowless interrogation room. After being left alone in the room for fifteen to twenty minutes, Bubonics was interrogated by two petty officers working as base security investigators.

Prior to the interrogation, Bubonics was read and waived his rights under *Miranda* and Article 31(b). During the initial phase of the interrogation, Bubonics denied culpability in the crime. He appeared very nervous, however, and the interrogators suspected that he was lying. Accordingly, the interrogators took a break and, after conferring with their supervisor, decided to employ the "Mutt and Jeff" (or good guy/bad guy) routine during the next phase of the interrogation.[139]

When the interrogation resumed, one of the petty officers assumed the role of the "bad guy" and angrily accused Bubonics of lying and wasting the investigators' time. In the course of this play acting, "bad guy" also stated that because Bubonics was wasting his time, he "could sign a warrant to have him arrested by the Virginia Beach police."[140] The "bad guy" then left the room. The remaining investigator then continued the stratagem by seeking to calm Bubonics' rattled nerves. He sought to gain Bubonics' trust by stressing that the "bad guy"

131. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1972).

132. Culombe v. Connecticut, 367 U.S. 568, 602 (1960).

133. *Schneckloth*, 412 U.S. at 224-25. The Court's application of the voluntariness doctrine reflects,

> an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws . . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Id.

134. *Id.* at 226.

135. 45 M.J. 93 (1996), *aff'g* 40 M.J. 734 (N.M.C.M.R. 1994).

136. *Id.* at 95.

137. *Id.* at 96.

138. United States v. Bubonics, 40 M.J. 734, 736 (N.M.C.M.R. 1994).

139. *Id.* at 737. At trial, one of the interrogators described the "Mutt and Jeff" procedure as follows:

> The good-guy/bad guy routine, in interrogation, is widely used. It's actually a very good method, I've found in my seven years, eight years, of doing them. What it is, is you get the initial contact with the suspect. Initial, you know, police officer, whoever is doing the interrogation. And he, you know, is sympathetic with them, and is very nice and cordial with them. And then he'll go out and he'll get, like in my--case, what I played. The bad guy. The other guy will come in and be, you know, just doesn't want to hear, doesn't want to hear your lies. 'Look, I don't have time to--play around here. I got better things to do,' you know. Raising your voice, slamming doors, stuff -- stuff to that effect. Stays in for a very short period of time, says what he's got to say and leave.

Id. (quoting Record at 41).

The "Mutt and Jeff" act was one of the commonly used techniques discussed by the Supreme Court in its description of the inherently coercive nature of police interrogations in *Miranda v. Arizona*, 384 U.S. 436, 452 (1966).

140. *Bubonics*, 40 M.J. at 738 (quoting record at 106, 143).

was not in charge of the investigation. The ploy worked, and Bubonics signed a sworn written confession at 0330.[141]

The NMCMR set aside Bubonics' conviction. The court ruled that, despite Bubonics' initially valid waiver of his rights under Article 31 and *Miranda*, the statement was not the product of Bubonics' free will. The NMCMR discussed two separate aspects of the interrogation techniques used by the police agents in extracting Bubonics' confession. The court first found that the classic "Mutt and Jeff" routine does not render a confession *per se* inadmissible, but rather it is a psychological ploy which must be examined based on a totality of the circumstances.[142]

The NMCMR court took a less charitable view of the interrogator's threat to deprive Bubonics of his liberty and subject him to prosecution by civilian authorities. In fact, the court suggested that its own precedent provided that threats to prosecute or hold an accused in custody unless a statement is made render a resulting statement *per se* inadmissible.[143] Perhaps in an effort to deal with the issue before a *per se* interpretation became the accepted view, the Navy-Marine Corps Government Appellate Division sought review of *Bubonics* from the CAAF.[144]

On review, the CAAF affirmed the NMCMR's decision setting aside Bubonics' conviction.[145] The government can claim some measure of victory in *Bubonics*, however, because even though the facts of this case enabled Bubonics to win the battle for his freedom, the Navy-Marine Corps Government Appellate Division won the larger victory of holding the line on the standard for voluntariness determinations. Although the CAAF agreed that Bubonics' statement was inadmissible, it read the lower court's opinion in a decidedly narrow fashion. While the CAAF declared full support of the NMCMR's analysis, it clarified the lower court's discussion about the relevant police interrogation techniques. It also quashed the notion of bright line prohibitions replacing traditional voluntariness analysis based on a totality of the circumstances.

The CAAF ruled that, when read in its entirety, the lower court opinion "clearly articulated its responsibility to assess the 'totality of all the surrounding circumstances.'"[146] With regard to the heavy weight assigned to the threat to turn Bubonics over to civilian authorities in the NMCMR's analysis, the CAAF simply stated: "The court's responsibility to consider the surrounding circumstances, however, does not translate into a prescription to weigh all factors *evenly.*"[147]

Read in conjunction with *United States v. Martinez*,[148] *Bubonics* illustrates that challenges based on good old fashioned voluntariness determinations are a valuable hedge against the shrinking protection of Article 31(b).[149] In *Martinez*, the court addressed a government appeal of the military judge's ruling that the accused's pretrial statement was involuntary. The military judge found that the statement was the product of psychological coercion despite the absence of custody and despite proper provision of rights warnings and a valid waiver of Article 31 rights by the accused.[150] On appeal, the CAAF indicated

141. *Id.* at 737.

142. *Id.* at 740.

143. *Id., citing* United States v. Jones, 34 M.J. 899, 907 (N.M.C.M.R. 1992). As pointed out by the CAAF, this is only one possible reading of the Navy-Marine Corps court's opinion. *See infra* notes 145-46 and accompanying text.

144. The issue for appeal was framed as follows:

> Did the Navy-Marine Corps Court of Military Review err as a matter of law in reversing the military judge's finding that appellee's confession was inadmissible when:
>
> 1. It held, implicitly, that a confession is *per se* inadmissible when a statement which could be construed to be a threat to prosecute or hold an accused in custody unless he confessed is made during an interrogation . . .

Bubonics, 45 M.J. at 94.

145. *Id.* at 96.

146. *Id.* at 95 (quoting *Bubonics*, 40 M.J. at 739, 741).

147. *Id.* Discussing how the same factor may receive different weight in different cases, Senior Judge Everett again adds color to the military justice landscape: "In fact, it seems self evident--from the mandate, itself, to consider the totality of the circumstances--that the risk of havoc posed by a bull in a china shop is distinctly different from such a risk posed by the same bull in a pasture." *Id.*

148. 38 M.J. 82 (C.M.A. 1993).

149. Application of the voluntariness doctrine is not limited to questions of admissibility. Military Rule of Evidence 304(e)(2) allows the defense,

> to present evidence with respect to voluntariness to the members for the purpose of determining what weight to give the statement. When trial is by judge alone, the evidence received by the military judge on the question of admissibility also shall be considered by the military judge on the question of weight without the necessity of a formal request to do so by counsel. Additional evidence may, however, be presented to the military judge on the matter of weight if counsel chooses to do so.

that the record did not clearly describe circumstances of outrageous police conduct.[151] The court noted, however, that a totality of the circumstances voluntariness determination "does not connote a cold and sterile list of isolated facts; rather it anticipates a holistic assessment of human interaction."[152] Given the complex nature of *ad hoc* voluntariness determinations, the court concluded that military judges are in a superior position than appellate courts for decision making in this area.[153]

What this means to practitioners is that resolution of voluntariness questions is very dependent on the presentation of the issue at trial. Because resolution of this issue is based on a totality of the circumstances, advocates must be sure to present evidence concerning *all* the facts that might reasonably affect a subject's decision to speak. Simply putting the accused, or the interrogator, on the stand to "explain what happened," is not enough. Instead, advocates should take the time to develop a complete picture of the circumstances of the interrogation. Vehicles for accomplishing this task might include any of the following: pictures or video presentations of the interrogation site; inspection of the interrogation site by the military judge; demonstrative exhibits describing the chronology of the interrogation process (to include pre-interrogation events that might affect the accused's decision to speak); or expert testimony concerning the susceptibility of the accused to coercive pressure.[154]

Conclusion

Reports regarding the death of Article 31(b) are at least slightly exaggerated. Article 31(b) rights warnings are still required in many situations where the coercive pressure of superior military rank or position might interfere with a service member's free exercise of the privilege against self-incrimination.[155] The scope of applicability of Article 31(b) requirements is gradually being reduced, however, as the CAAF increasingly looks to the subjective designs of interrogators as a guide to the existence of coercive pressure. The problem is compounded by the fact that the CAAF provides precious little analysis or explanation of how current Article 31(b) decisions square with prior decisions in this area.

At the same time, the CAAF has strengthened the foundation of the voluntariness doctrine. As Article 31(b) struggles to maintain relevance in interrogations outside of mainstream police investigations, the voluntariness doctrine may become an increasing feature of courts-martial litigation. But after all, it has been a valid basis of consideration all along.

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150. *Id.* at 83-84.

151. The court noted: "Surely, there are worse recorded cases of psychological coercion. On the other hand, the military judge's detailed findings about what went on during the session and the atmosphere surrounding the session just as surely do offer support to a legal conclusion of involuntariness." *Id.* at 86.

152. *Id.* at 87.

153. The court observed: "[T]he military judge was in a unique position to decide the appropriate weight to give appellant's assertion of an overborne will. His vantage point is one that simply cannot be reproduced, either by the Court of Military Review, or by this Court." *Id.* at 86. That is not to say that decisions of the military judge are necessarily conclusive. The court also noted that the issue of voluntariness is a legal question, and that the CAAF owes no special deference to the view of the CMR or the military judge. *Id.* at 86.

154. *See* United States v. Doucet, 43 M.J. 546 (N.M.Ct.Crim.App. 1995). In *Doucet*, expert testimony was admitted that accused suffered from a "Receptive Language Developmental Disorder." The expert testified that "under normal circumstances, the appellant 'probably does okay,' but that when under stress, the problem may become 'moderate or even severe,' resulting in difficulty in understanding and making decisions." *Id.* at 658 (citation omitted).

155. One commentator has quipped that according to the CMA, the trigger portion of Article 31(b) now means the following:

> No person subject to this chapter except medical personnel and persons acting out of purely personal curiosity, but including post exchange detectives and possibly state and foreign social workers and police who have a congruent investigation, may interrogate, for purposes of criminal, or quasi-criminal civil, prosecution clearly contemplated at the time of interrogation, or may request any statement from an accused or person suspected, either objectively or subjectively, of an offense, only if the person being questioned is aware that the person asking the questions is acting in a law enforcement or disciplinary fashion, without first informing him . . . .

McGillin, *Officiality Doctrine, supra* note 66, at 2.